Petition

81-980

Office - Supreme Court, U.S.
FILED
NOV 24 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT D. HATCH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUIAT, BUCHOLTZ, BULL & LAFF, P.C.
By: James C. Bull
Alan H. Bucholtz
1776 First National Bank Building
Denver, Colorado 80293
Telephone: (303) 623-1776

ROBERT CUMMING
335 North Roberts Way
Camano Island, Washington 98292

ATTORNEYS FOR PETITIONER
ROBERT D. HATCH

QUESTIONS PRESENTED FOR REVIEW

1. Does the minority of a Plaintiff toll the Statute of Limitations under the Federal Tort Claim Act?

2. Does the Federal Tort Claims Act Two Year Statute of Limitations as applied to Minors (assuming no tolling during minority) create an unfair imbalance in favor of the Government, since claims of the United States against minors may be tolled during their minority?

3. Did Petitioner's lack of personal knowledge of the causal connection between the streptomycin therapy and his injuries combined with his lack of knowledge of any potential malpractice, toll the Statute of Limitations, or is he bound by his parents' knowledge?

DESIGNATION OF PARTIES

The parties to this Petitioner are as designated in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
DESIGNATION OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
REFERENCE TO OPINIONS	2
STATEMENT OF JURISDICTIONAL GROUNDS	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
ARGUMENT	6
A. DOES THE MINORITY OF A PLAINTIFF TOLL THE STATUTE OF LIMITATIONS UNDER THE FEDERAL TORT CLAIMS ACT?	6
B. DOES THE FEDERAL TORT CLAIMS ACT TWO YEAR STATUTE OF LIMITATIONS AS APPLIED TO MINORS (ASSUMING NO TOLLING DURING MINORITY) CREATE AN UNFAIR IMBALANCE IN FAVOR OF THE GOVERNMENT SINCE CLAIMS OF THE UNITED STATES AGAINST MINORS MAY BE TOLLED DURING MINORITY?	12

C. DID THE PETITIONER'S LACK OF PERSONAL KNOWLEDGE OF THE CAUSAL CONNECTION BETWEEN THE STREPTOMYCIN THERAPY AND HIS INJURIES COMBINED WITH HIS LACK OF KNOWLEDGE OF ANY POTENTIAL MALPRACTICE TOLL THE STATUTE OF LIMITATIONS OR IS HE BOUND BY HIS PARENTS' KNOWLEDGE? 13

APPENDIX A 18

Opinion of Tenth Circuit Court of Appeals, marked "Not for Routine Publication".

APPENDIX B 22

Order dated September 3, 1981, denying Petition for Rehearing

APPENDIX C 23

28 U.S.C. § 2415(a)-(h)

APPENDIX D 26

28 U.S.C. § 2416(a)-(d)

APPENDIX E 27

28 U.S.C. § 2501

APPENDIX F 28

Colo. Rev. Stat. 1973 § 13-80-116

TABLE OF AUTHORITIES

Page(s)

A. CASES

Brown v. United States, 353 F.2d 578 (9th Cir. 1965) 16

Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977) 13,15

Hunter v. North Mason High School, 85 W.2d 810, 539 P.2d 845 (1975)..... 12

Kirby v. Gulf Oil Corp., 230 S.C. 11, 94 SE 2d 21 (1956) 14

McDonald v. Spring Valley, 285, Ill., 52, 120 N.E. 476 (1918) 14

Philbrook v. Glodgett, 421 U.S. 707 (1975)..... 11

Pittman v. United States, 341 F.2d 739 (9th Cir. 1965) 16

Portis v. United States, 483 F.2d 670 (4th Cir. 1973) 15

Rahn v. United States, 222 F.Supp. 775 (S.D. Ga., 1963) 15

Raney v. Barnes Lumber Co., 195 Va. 956, 81 SE 2d 578 (1954) 14

Reilly v. United States, 513 F.2d 147 (8th Cir. 1975) 15

Tyminski v. United States, 481 F.2d 257 (3rd Cir. 1973) 15

United States v. Glenn, 231 F.2d 884 (9th Cir. 1956), cert. den. 352 U.S. 926 (1956) 6,8,9,11,12,16

United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed. 2d 259, (1979) 6,13,14

B. STATUTORY REFERENCES

USC § 1254(1) 2

28 USC § 1346(b) 2,4

28 USC § 2401(a) and (b) 3,6,10

28 USC § 2415 4,12,16

28 USC § 2416(b) 4,12,16

28 USC § 2501 4,7,8,11

28 USC § 2671 et seq. 2,4

28 USC § 2674 3

Colo. Rev. Stat., 1973, § 13-80-116 4,5,7

C. TREATISES

Federal Rules of Civil Procedure 14

1949 U.S. Code Cong. Service 9

1966 U.S. Code Cong. Service 11

3 Am Jur 2d, *Agency*, § 10 14

42 Am Jr 2d, *Infants*, § 158 14

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT D. HATCH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on August 10, 1981, and the Order of Court denying rehearing entered on September 3, 1981.

REFERENCE TO OPINIONS

The Opinion of the United States Court of Appeals for the Tenth Circuit has not been published. The Opinion, marked "Not for Routine Publication" is reproduced in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

(i) This Petition is brought to review an Opinion of the United States Court of Appeals for the Tenth Circuit, which affirmed a judgment of the United States District Court for the District of Colorado. The Opinion was filed August 10, 1981 with the Clerk of the Court and is reproduced in the Appendix. The Opinion was designated "Not for Routine Publication" and has not appeared in the Federal Reporter System.

(ii) A Petition for Rehearing was filed August 20, 1981 and was Denied by Order dated and entered September 3, 1981. The Order is reproduced in the Appendix.

(iii) The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following Statutes are primarily involved in this case:

28 U.S.C. § 1346. United States as defendant.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the

negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

28 USC § 2401 (1978 Amendment Omitted)

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

June 25, 1948, c. 646, 62 Stat. 971; Apr. 25, 1949, c. 92 § 1, 63 Stat. 62; Sept. 8, 1969, Pub.L. 86-238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.L. 89-506, § 7, 80 Stat. 307.

28 USC § 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not

be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

Additional statutory provisions are referred to in the argument and are fully set out in the Appendix. These are:

28 USC § 2415

28 USC § 2416(b)

28 USC § 2501

Colo. Rev. Stat., 1973, § 13-80-116

STATEMENT OF THE CASE

Petitioner commenced this action in the United States District Court for the District of Colorado, on February 17, 1977, under the Federal Tort Claims Act, 28 USC § 2671 et seq. and 28 USC § 1346(b), seeking to recover damages for medical malpractice occurring shortly after his birth. The enumerated statutes confer jurisdiction on the District Court.

Robert D. Hatch was born on June 14, 1956, at Elemendorf Air Force Base, Anchorage, Alaska. About ten days after his birth, military medical personnel began a two week course of streptomycin therapy which resulted in an almost total bilateral hearing loss and drop foot palsy of the right leg and foot.

Petitioner's parents became aware of the probable causal connection between the injuries and the streptomycin therapy in about September, 1961. Their overriding consideration, however, was treatment and rehabilitation for their son. From 1956 to 1975, Bobby Hatch, the Petitioner, received treatment and assistance for his injuries at various military and non-military facilities, although he was not treated by the same medical personnel involved in the streptomycin therapy.

Petitioner's parents, though they were aware of a connection between the streptomycin injections and Bobby's injuries, were unaware that he had a potential malpractice claim until 1976.

The Petitioner, Robert D. Hatch, had no personal knowledge of either the causal connection between the streptomycin and his disabilities or any potential malpractice claim until 1976. All he knew was that his hearing loss and leg deformity had been with him "as long as I can remember."

An administrative claim under the Federal Tort Claims Act was filed on or about June 14, 1976 and was denied November 25, 1976. This action was commenced within six (6) months thereafter. Petitioner became emancipated under Colorado Revised Statutes, 1973, § 13-80-116, as amended, and the claim and this action were initiated within two years after emancipation. The administrative claim, in any event, was filed within two years after Petitioner's eighteenth birthday.

The trial Court, after hearing testimony and considering the facts previously established on the record, determined that there was negligence in treating Petitioner, and that such negligence was a proximate cause of Petitioner's deafness and right leg injuries. The Court also found that Petitioner had no personal knowledge of the cause of his injuries until 1976.

The trial Court, however, determined that Petitioner was bound by the knowledge of his parents as to causal

connection between the streptomycin therapy and his injury and relying on *United States v. Kubrick*, 444 US 111, 100 S.Ct. 352, 62 L.Ed. 2d 259 (1979), held that the action was barred by the two year statute of limitations and the statute was not tolled during his minority. The case was therefore dismissed.

The United States Court of Appeals for the Tenth Circuit affirmed the dismissal.

ARGUMENT

A. DOES THE MINORITY OF A PLAINTIFF TOLL THE STATUTE OF LIMITATIONS UNDER THE FEDERAL TORT CLAIMS ACT.

The leading case discussing the issue of whether minority tolls the Statute of Limitations under the Federal Tort Claims Act is, *United States v. Glenn*, 231 F.2d 884 (9th Cir., 1956), cert. den. 352 U.S. 926 (1956). The *Glenn* case is the one generally referred to by other courts facing the problem.

In that case, Michael Glenn had been injured in 1949 when a Naval medical employee dropped him on the floor shortly after his birth. Suit was instituted in 1953. The negligence, and the resulting injury, were immediately apparent. In the trial court, the Glenn child had been successful, the Court holding that 28 U.S.C. § 2401(a) and (b) should be read together and that infancy tolled the statute. See, 129 F.Supp. 914 (D. Cal. 1955).

On appeal, a divided Ninth Circuit reversed, holding that the two subsections should not be read together, claiming that the legislative history sustained the government's position. They stated that, "There is no committee report and no Congressional colloquy or debate that sustained the position of the plaintiff-appellee." *United States v. Glenn, supra.*, 231 F.2d at 886.

Although the Ninth Circuit majority was correct in asserting that there is no specific references supporting the trial court opinion, there are also no specific passages to the contrary. The general language of the legislative history does, however, support an interpretation which would bring Federal law into conformity with State law as it applies to the statute of limitations. In Colorado, that includes the tolling of the statute during minority. See, Colorado Revised Statutes, 1973, § 13-80-116.

The legislative history of the pertinent act, revising and enacting into law Title 28 of the United States Code, may be found in the last volume of Title 28, U.S.C.A., containing Sections 2501, et seq., pages 365-459.

The Report of the House Judiciary Committee, for example, contains the following references:

> The first step in revision was the preparation of a preliminary analysis — the framework upon which to build the new title. In drafting this outline the old system of classification was discarded and a modern subject matter arrangement was substituted.
>
> * * *
>
> A clear and uniform style was an important aim at this revision. Concise, clear, and direct expressions were preferred to verbose, *redundant* and circuitous language. This is fully indicated in the revisor's notes in the appendix to this report. (Emphasis supplied) 28 U.S.C.A., § 2501 et seq., p. 371.

In speaking in favor of the bill, John F. X. Zinn, former special counsel to the House Committee on Revision of the Laws, made the following pertinent comments:

> I am proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full

faith and credit, and evidence and procedure. These are but labels to the layman. To lawyers they are the pitfalls of litigation. Wise judges and lawyers have objectively and dispassionately explored these pitfalls and covered them with well-drawn statutes *so that postwar justice may be sure-footed, courageous, impartial, and serene.*

Even the law governing particular proceedings has been reworked by this bill; and it proposes good statutes to govern such matters as declaratory judgments, habeas corpus, injunction, interpleader, and three-judge courts.

* * *

The legislature must see to it that wise and progressive judges are provided with the tools of justice. And the legislative foundation of judicial action must be broad-based and modernized. These objectives this bill assists in achieving. *It adapts the statutory basis of justice to resist when necessary and to yield when necessary to the stresses and strains of modern affairs.* It is designed to aid in keeping the ship of state afloat in stormy judicial seas. And it heeds the admonition of Cardozo in his Nature of the Judicial Process (p. 168) when he said:

"The great tides that engulf the rest of men do not turn aside in their course and pass the judges by."

28 U.S.C.A. § 2501 et seq. p. 421 (Emphasis supplied).

The *Glenn* court also apparently ignored the pertinent comments in the Legislative History of the 1949 revision of the time to bring suit under Federal Tort Claims Act. An important aspect of increasing the basic time period from one year to two years was the shortness of the original

period, leading to "injustice in many instances." Detailed comparisons were made with state statutes of limitations for tort, the intent of Congress being to bring the Federal law more in line with that of the states.

In response to complaints by Government agencies that they would be disadvantaged by a longer limitation period, it was pointed out that, "No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary lay or private defendants." 1949 U.S. Code Cong. Service, 1227.

It was not the intent of Congress to have claims barred and in referring to wrongful death cases and the military it was stated that:

> Moreover, the wide area of operations of the Federal agencies, particularly the armed-service agencies, would increase the possibility that notice of the wrongful death of a deceased to his next of kin would be so long delayed in going through channels of communication that the notice would arrive at a time when the running of the statute had already barred the institution of a claim or suit.
>
> It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies . . .
>
> 1949 U.S. Code Cong. Service, 1229.

More than twenty years have passed since the *Glenn* case and it is time to look carefully at the reasoning of Judge Stephens who dissented in *Glenn*. He cogently pointed out that:

> The revisors of Title 28 of the United States Code undertook to eliminate repetitions and conflicting sections of the code and to that end, sections pertaining to specific factual situations were replaced

by sections applying more generally. The subject of limitations was treated under this principle. Thus, they encircled "Every civil action commenced against the United States" by the limitation of six years to begin action. *Of course, the revisors were well cognizant of the doctrine that a person with a cause of action should not be deprived of his cause by a limitation running while he could not act.* Appropriately, then in the same paragraph which contains the limitation, the revisors diluted the full effect of the limitation by providing that it would not run during the period of the disability and providing, not the full six years after the disability had been removed, but just half that time.

But it was thought that tort claims against the government were of such a nature as to merit different treatment, and paragraph (b) became a part of the section providing for different limitations, but did not touch the subject of disability.

I do not read section 2401 as a whole, as completely shutting those under disability from the right to recover compensation for the government's wrong and I do not believe Congress, or the revisors, intended that result.

* * *

One recovering from a disability may be under greater handicap in learning as to his rights or in assembling proof with the burden he must bear, than one who is free to act immediately after the injury.

Looking at the problem as a whole, it seems to me, as it seemed to the trial judge, that *the plain wording and context of that section supports and requires the holding that one suffering injury by the government's negligence is not deprived of his day*

> *in court because, for a specified time, he could not ask for it.*

231 F.2d at 887 (Emphasis Supplied).

The Supreme Court on more than one occasion has indicated that courts must look to the whole law and to its objects and policy. It is the court's duty to ascertain congressional intent and to give it effect. See, *Philbrook v. Glodgett*, 421 U.S. 707 (1975), and cases cited therein.

Petitioner submits that not only was there prior legislative history to support the trial judge and Judge Stephens in the *Glenn* case, but the 1966 revision, in its legislative history, indicates that the Congress desired to handle tort claims more expeditiously and also wished to have the United States in a position more nearly equal to that of private citizens.

In discussing the adoption of statutes of limitations controlling suits *by* the government, the Attorney General, Nicholas de B. Katzenbach, stated:

> Application of statutes of limitations in tort and contract actions would make the position of the Government more nearly equal to that of private litigants.

1966 U.S. Code Cong. and Admin. News, p. 2525.

Given this background, it is incongruous that the interpretation in *Glenn* can remain viable. To say that Petitioner could unquestionably maintain a contract claim which is tolled during minority, but not a tort claim stemming from significantly disabling injuries, is patently unjust and inequitable. It is submitted that Congress, in 1948, 1949 and 1966, did not and does not intend such a result.

If Federal Tort Claims Act cases were triable in the Court of Claims, 28 U.S.C. § 2501 would have protected Plaintiff during his minority. Petitioner submits that it is

time to put the inequities of *Glenn* to rest and urges this Court to grant this Petition and do so.

B. DOES THE FEDERAL TORT CLAIMS ACT TWO YEAR STATUTE OF LIMITATIONS AS APPLIED TO MINORS (ASSUMING NO TOLLING DURING MINORITY) CREATE AN UNFAIR IMBALANCE IN FAVOR OF THE GOVERNMENT SINCE CLAIMS OF THE UNITED STATES AGAINST MINORS MAY BE TOLLED DURING MINORITY?

Petitioner would further submit that the strained result reached by the *Glenn* majority denies Petitioner and other persons under disability reasonable equality of position, *vis a vis*, the United States. For example, if the United States had wanted to sue Bobby Hatch, it, as a plaintiff, could have waited until he reached majority. See 28 U.S.C., §§ 2415 and 2416(b). This is the statutory reference of former Attorney General Katzenbach, cited above.

The language of the Supreme Court of Washington in *Hunter v. North Mason High School,* 85 W.2d 810, 539 P.2d 845 (1975) is instructive on current judicial attitudes toward affording citizens equal protection in claims against government entities. In *Hunter,* the court declared unconstitutional a statutory provision requiring notice to the government agency within one hundred twenty (120) days from the date the claim arose. The Court indicated that the sovereign immunity waiver indicated a willingness by the State not to place procedural stumbling blocks before a claimant.

In ruling on the constitutional issue, the Washington Supreme Court went beyond the lower appellate court position that plaintiff's minority alone excused compliance. See, 539 P.2d at 846. The Court stated that:

> Any policy of placing roadblocks in the way of potential claimants against the state having been abandoned, we cannot uphold nonclaim statutes

> simply because they serve to protect the public treasury. Absent that justification, there is no basis, substantial or even rational, on which their discrimination between governmental plaintiffs and others can be supported. They thus cannot stand under the equal protection clause of the Fourteenth Amendment to the United States Constitution. We follow a growing number of courts in holding that the arbitrary burden placed on state claimants by this type of statute cannot withstand constitutional scrutiny.
>
> 539 P.2d at 850, 851.

It is respectfully submitted that the same rationale applies to the interpretation of whether infancy tolls the statute and that this Court, as it has in many other cases, should adopt a modern, fair and just interpretation of the statute and declare that minority was intended as a condition which tolled the statute.

C. DID PETITIONER'S LACK OF PERSONAL KNOWLEDGE OF THE CAUSAL CONNECTION BETWEEN THE STREPTOMYCIN THERAPY AND HIS INJURIES COMBINED WITH HIS LACK OF KNOWLEDGE OF ANY POTENTIAL MALPRACTICE, TOLL THE STATUTE OF LIMITATIONS OR IS HE BOUND BY HIS PARENTS' KNOWLEDGE?

The trial court in this case held that *United States v. Kubrick, supra,* was controlling on the issue of when Petitioner's malpractice claim accrued. Assuming that the opinion in *Kubrick* overrruled the three element test of *Exnicious v. United States,* 563 F.2d 418 (10th Cir., 1977) for accrual of malpractice actions (i.e. injury, causation and legal implications), there are still issues in the present case not reached in *Kubrick.*

It is apparently the law, now, under *Kubrick*, that once an injured person becomes aware of the injury and its causal

connection with some act by a government employee, the claim accrues for purpose of the FTCA statute of limitations. Given even this narrow approach, the fact in this case is that Petitioner, Robert D. Hatch, did not have actual knowledge of the causal connection between the streptomycin therapy and his deafness or leg injury until 1976, and the trial court so found. Thus, the question arises, is he bound by the knowledge of his parents?

Kubrick, since it dealt with an adult claimant, did not address this issue. Should an injured person, disabled both by his injuries and infancy, be disqualified from seeking redress when he learns of his rights, solely because his parents or guardian or other adult, does not sue on his behalf? Should the parents' belief, for example, that a serviceman cannot sue the government, or that their religious or moral beliefs preclude suit or their dedication to the care and rehabilitation of their child (as was the case here), serve to bar their child's later exercise of his individual rights? Logic and justice dictate that the parents' failure to act should not be a bar.

There is a wealth of law to the effect that a parent does not become the agent of his child merely by virtue of the fact of parenthood. See, e.g. *McDonald v. Spring Valley*, 285 Ill. 52, 120 N.E. 476 (1918) and *Kirby v. Gulf Oil Corp.*, 230 S.C. 11, 94 SE 2d 21 (1956). Nor is there any presumption of such agency. *Raney v. Barnes Lumber Corp.*, 195 Va. 956, 81 SE 2d 578 (1954).

Even if Bobby Hatch had wanted to have his parents act as his agents (and there is no evidence to support such a theory), such attempt would be void or at least voidable. See 3 Am Jur 2d, *Agency*, § 10. It is clearly the law that Bobby could not have filed suit by himself during his minority. A guardian or "next friend" or some other appointee would have been required. See Rule 17(c), Federal Rules of Civil Procedure, and 42 Am Jur 2d, *Infants*, § 158. Initiation of such a suit by a guardian or next friend is permissive, however, and a minor should not be prejudiced by the failure to so act.

If Petitioner was not bound by his parents' knowledge or inaction, then the rational of *Portis v. United States*, 483 F.2d 670 (4th Cir., 1973), involving a hearing loss similar to Petitioner's applies. In *Portis*, the court reversed the trial court dismissal of a complaint, holding that since there was no knowledge of the cause of the hearing loss for several year, the claim did not accrue until discovery. This concept has been expanded and refined by later decisions. See also, *Rahn v. United States*, 222 F.Supp. 775 (S.D. Ga., 1963) where lack of knowledge was sufficient to delay accrual of the claim.

A related factor in this case is the need, by virtue of the damage done to Bobby Hatch, for continuous treatment at a variety of hospitals and health care facilities from birth to at least 1975.

In *Reilly v. United States*, 513 F.2d 147 (8th Cir., 1975), the Court stated, in defining the continuous treatment theory:

> The rule is premised on the notion that a person should not be required to investigate the cause of his injuries or to bring suit while receiving necessary treatment for the injuries.

In *Exnicious v. United States, supra*, the Tenth Circuit held, at 420, 421, a "person may be aware of his injuries and perhaps connect it with prior medical treatment but may be totally ignorant as to whether or not it conformed to accepted medical practice," citing *Tyminski v. United States*, 481 F.2d 257 (3rd Cir., 1973).

As the Court in *Tyminski* said:

> Reasonable diligence does not require that a person who does not know of the acts constituting malpractice and who has little reason to doubt that his injury resulted from the natural progression of a preoperative disorder interrupt the care he is receiving to cure his injuries in order to ascertain

> whether the persons providing the care negligently caused his injuries.
>
> 481 F.2d at 264.

In that instant case there is a specific trial court finding that Bobby Hatch had no knowledge of the cause of his injuries. The Court below then imputed the knowledge of his parents to him under the Federal Tort Claims Act. This attributed to the parents the status of agent for the child without any act creating the agency, contrary to basic law. The Tenth Circuit holding, relying on *Brown v. United States*, 353 F.2d 578 (9th Cir., 1965) is not only contrary to established agency law, but is a denial of essential equal treatment. This is true from two perspectives. First, the United States in a claim against a minor has the benefit of the tolling of any statute of limitations. See 28 U.S.C. §§ 2415 and 2416(b). *Brown*, in fact, did not specifically hold that the parents' knowledge is imputed, but merely indicated that such was, in effect, "implicit" relying on *Pittman v. United States*, 341 F.2d 739 (9th Cir., 1965). Further, in *Brown* the action taken by the government doctors was for life-saving purposes, a fact not established in this case.

Second, the prior opinion denies to children with parents or duly appointment guardians the same rights as minors without parents or a duly appointed guardian, who would not have such knowledge imputed to them.

It is inequitable under all of the circumstances in this case to deprive Petitioner of his right to recover for his injuries because his parents may have failed to act effectively.

The questions raised in this Petition, specifically, the issues of the tolling of the Statute of Limitations during minority (since this Court elected not to review the *Glenn* decision) and whether agency principles impute his parents' knowledge to him, have not been previously addressed by this Court. These are both important issues affecting the

lives and rights of many people. Petitioner prays that the Court will elect to consider and resolve this matter.

QUIAT, BUCHOLTZ, BULL & LAFF, P.C.
By: ALAN H. BUCHOLTZ
1776 First National Bank Building
Denver, Colorado 80293
Telephone: (303) 623-1776.

and

ROBERT CUMMING
335 N. Roberts Way
Camano Island, Washington 98292
Telephone:

ATTORNEYS FOR PETITIONER

November ___, 1981

APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT D. HATCH,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	No. 80-1195
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendants/Appellants,	)	
	)	

Appeal from the United States District Court
For the District of Colorado
(D. C. No. 77-M-191)

Alan H. Bucholtz of Quiat, Bucholtz, Bull & Laff and Robert Cumming, Denver, Colorado, for Plaintiff-Appellant.

Nancy E. Rice, Assistant United States Attorney (Joseph Dolan, United States Attorney, with her on the brief), Denver, Colorado, for Defendant-Appellee.

Before LOGAN and BREITENSTEIN, Circuit Judges, and BROWN, District Judge*.

PER CURIAM.

*Honorable Wesley E. Brown, of the United States District Court for the District of Kansas, sitting by designation.

This is an appeal from judgment of the district court, after trial, dismissing as time-barred Robert D. Hatch's complaint seeking damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* On appeal we must decide whether the trial court properly held that the applicable statute of limitations was not tolled by plaintiff's minority, his lack of personal knowledge of the cause of his injury, the continuous treatment doctrine, or equitable considerations.

In June 1956, when Hatch was approximately ten days old, medical personnel at Elmendorf Air Force Base treated him with streptomycin, which caused deafness and a crippling of his right foot and leg. From that time until 1975, Hatch received treatment for these injuries at various military and non-military medical facilities. By September 1961 Hatch's parents had become aware of the likelihood that the streptomycin therapy had caused the injuries, but allegedly neither Hatch nor his parents knew of the potential liability of the United States until 1976 when they filed an administrative claim. This action was commenced in February 1977 after the administrative claim was denied. The case was tried to the court, which determined there was negligence in the treatment of Hatch and that such negligence was the proximate cause of the injury. Nevertheless, relying upon the recent Supreme Court decision in *United States v. Kubrick,* 444 U.S. Ill (1979), the district court found that Hatch's claim accrued in 1961, when his parents first learned of the causal connection between the streptomycin therapy and their son's injuries. It concluded Hatch's claim was barred by the two-year statute of limitations. This appeal followed.

I

Except for the issues of tolling during minority and the minor's lack of personal knowledge of the cause of the injury, this case closely resembles *Kubrick.* There plaintiff was treated with neomycin, which caused his deafness. Plaintiff knew of the injury and its cause, but not that it was negligently inflicted; more than two years before filing his claim. *Kubrick* held that a cause accrues under the Federal

Tort Claims Act upon claimant's knowledge of the existence and cause of his injury; knowledge of a legal duty or breach thereof is irrelevant.

Robbins v. United States, 624 F.2d 971 (10th Cir. 1980), controls other aspects of the instant case. We there held that knowledge of the full extent of the injury was not necessary to commence the running of the time limitation and that claimant's minority does not toll operation of the statute of limitations. The cases which have treated tolling during minority compel the conclusion that the knowledge of the parent is to be imputed to the child. "[T]he parents or guardians of a minor must preserve the minor's claim by timely action." *Brown v. United States*, 353 F.2d 578, 579 (9th Cir. 1965). *See also Smith v. United States*, 588 F.2d 1209, 1211 (8th Cir. 1978); *Childers v. United States*, 442 F.2d 1299 (5th Cir.); *cert. denied*, 404 U.S. 857 (1971); *Pittman v. United States*, 341 F.2d 739 (9th Cir. 1965); *United States v. Glenn*, 231 F.2d 884 (9th Cir.), *cert denied*, 352 U.S. 926 (1956). *Ct. Casias v. United States*, 532 F.2d 1339 (10th Cir. 1976) (insanity of a claimant does not toll the statute of limitations); *Jackson v. United States*, 234 F.Supp. 586 (E.D.S.C. 1964) (cerebral hemorrhage). During a claimant's minority or other legal incapacity *only* a parent, next friend, or legal guardian can protect claimant's interest. In the matter at hand, it is uncontroverted that plaintiff's parents were, at least by 1961, aware that the streptomycin therapy had probably caused the injuries. Consequently this action, filed more than fifteen years after that time, is conclusively barred by the statute of limitations.

The "continuous treatment" rule has no application here, as the treatment plaintiff received in no way deterred or prevented plaintiff or his parents from taking legal action. Furthermore, the rule does not apply when there is knowledge of the acts constituting negligence. *See Reilly v. United States*, 513 F.2d 147, 150 (8th Cir. 1975).

Finally, it is argued that equitable considerations mandate a different result in this case. However, *Kubrick* controls here also.

"Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell v. Haverhill,* 155 U.S. 610, 617 (1895), *Bell v. Morrison, supra,* at 360. We should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest.' *Guaranty Trust Co. v. United States,* 304 U.S. 126, 136 (1938).

"We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."

444 U.S. at 117-18.

AFFIRMED.

APPENDIX B

JULY TERM - September 3, 1981

Before Honorable James K. Logan, Honorable Jean S. Breitenstein, Circuit Judges and Honorable Wesley E. Brown, District Court Judge.*

ROBERT D. HATCH,	)	
	)	
Plaintiff/Appellee,	)	
	)	
v.	)	No. 80-1195
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendants/Appellants,	)	
	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied.

Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Kansas, sitting by designation.

APPENDIX C

28 U.S.C. Sec. 2415

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided,* That in the event of later partial payment or written acknowledgement of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement: *Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall be be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed after April 1, 1980 or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an

action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire on such lands; an action to recover for diversion of money paid under a grant progam; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such action for on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian who land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before April 1, 1980.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided,* That in the event of later partial payment or written acknowledgement of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommended within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommended the defendant shall not be barred from

interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Added Pub.L. 89-505, § 1, July 18, 1966, 80 Stat. 304, and amended Pub.L. 92-353, July 18, 1972, 86 Stat. 499; Pub.L. 92-485, Oct. 13, 1972, 86 Stat. 803; Pub.L. 95-64, July 11, 1977, 91 Stat. 268; Pub.L. 95-103, Aug. 15, 1977, 91 Stat. 842.

APPENDIX D

§2416. Time for commencing actions brought by the United States — Exclusions

For the purpose of computing the limitations periods established in section 2415, there shall be excluded all period during which —

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental imcompetence, diplomatic immunity, or for any other reason; or

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

(d) the United States is in a state of war declared pusuant to article I, section 8, of the Constitution of the United States.

Added Pub.L. 89-505, § 1, July 18, 1966, 80 Stat. 305.

APPENDIX E

28 U.S.C. Sec. 2501

§ 2501 Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disabilty or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account. June 25, 1948, c. 646, 62 Stat. 976; Sept. 3, 1954, c. 1263, § 52, 68 Stat. 1246.

APPENDIX F

Colo. Rev. Stat. 1973, Sec. 13-80-116

13-80-116. Persons under disability. Except as provided in section 13-80-105, if any person entitled to bring any action mentioned in this article is under the age of eighteen years, insane, imprisoned, or absent from the United States at the time the cause of action accrues, such persons may bring said action within the time in this article respectively limited after the disability is removed. A claim for injury shall be considered to accrue on the date the injury is known or should have been known by the exercise of reasonable diligence.